In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1273

MILDRED POPKIN,
Petitioner

versus

NEW YORK STATE HEALTH and MENTAL HYGIENE FACILITIES IMPROVEMENT CORPORATION,
Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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versus

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The Petitioner, Mildred Popkin, respectfully prays that a Writ of Certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 15, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is attached hereto as Appendix A, infra, p. A-1 . The opinion of the District Court for the Southern District of New York is reported at 409 F. Supp. 430 and is attached hereto as Appendix B, infra, p. A-8 .

JURISDICTION

The judgment of the Court of Appeals was entered on

December 15, 1976 (Appendix A, infra. p. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Petitioner was discharged by her employer, a corporation created by the State of New York, prior to the effective date of the 1972 Amendments to Title VII of the Civil Rights Act of 1964, which made that act applicable to state and local governments and their agencies. Believing that she was discharged because of her sex, petitioner filed a charge with the United States Equal Employment Opportunity Commission as required by Title VII. The Commission accepted the charge and investigated petitioner's claims. During the pendency of the investigation, the 1972 Amendments to the Act became effective. Subsequently, the Commission issued a determination that the Corporation was an employer covered by Title VII and that reasonable cause existed to believe that petitioner had been discriminated against because of her sex. Petitioner filed suit, but the District Court dismissed on the grounds that, at the time of the discharge, the corporation was a "political subdivision" not subject to Title VII, and that the 1972 Amendments could not be retroactively applied. The Second Circuit affirmed on those grounds.

The question presented is whether, under these circumstances, the 1972 Amendments to Title VII should have been given retroactive application so as to sustain petitioner's cause of action under the Act.

STATUTES INVOLVED

Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(b), as enacted, provided in relevant

part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five of more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof. . . .

The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §§ 2(1), 3, 86 Stat. 103 Amended Section 701 to provide in relevant part:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an

> Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5). . . .

The 1972 Amendments became effective on March 24, 1972. Pub. L. 92-261, §2(2).

STATEMENT OF THE CASE

Mildred Popkin was employed as an architect by the New York State Health and Mental Hygiene Facilities Improvement Corporation ("the Corporation"). The Corporation was created to provide improved state facilities for the care of the mentally disabled. Section 4(1) of the Health and Mental Hygiene Facilities Improvement Act, Laws 1968, Chap. 359; CLS Unconsol. Laws, Chap. 214, defines the corporation as a, "corporate governmental agency constituting a public benefit corporation. It shall have all the powers and privileges of a corporation . . ." In 1970, Section 4 of the Act was amended to provide that for certain specific purposes the Corporation was to be treated as a political subdivision.

> For the purposes of Section One Hundred Seventy-Five (a) and One Hundred Seventy-Five (b) of the State Finance Law, the corporation shall be deemed to be a political subdivision.

For all other purposes, however, the corporation remained a "public benefit corporation".

On January 15, 1971, Ms. Popkin was laid-off by the corporation for "budgetary reasons". Because at least four male architects, all with less seniority with the Corporation than Ms. Popkin, were not laid off, she believed that she was selected for termination because of her sex. Ms. Popkin filed a charge of sex discrimination with the New York Division of Human Rights which investigated and found probable cause to believe that she had been discriminatorily discharged because of her sex. The claim was not resolved by the Division, however, and she thereafter filed a similar complaint with the United States Equal Employment Opportunity Commission ("the EEOC").[1] The EEOC also investigated the charge and on March 29, 1973, issued a determination that the Corporation was an "employer" within the meaning of Title VII and found reasonable cause to believe that Ms. Popkin's discharge constituted a violation of the Act. The EEOC's subsequent efforts to conciliate the matter were rejected by the Corporation and a right-to-sue notice was issued.

Ms. Popkin filed this action in the Southern District of New York claiming relief under Title VII. Jurisdiction was based on 42 U.S.C§ 2000-e 5(f)(1) and on 28 U.S.C§§1331 and 1332.[2]

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1. Section 706(c) and (d) of Title VII, 42 U.S.C. § 2000-3(c) and (d), require deferral by the EEOC to a "State or local authority" with power under state law "to grant or seek relief from [an unlawful employment] practice". The New York Division of Human Rights was such an agency. See, Section 293 of Consolidated Laws of New York, Chapter 800, Laws of 1951. Section 706(e) of Title VII requires that a charge, first considered by a state authority, be filed with the EEOC within 300 days after the unlawful practice or within 30 days after the state or local authority has terminated proceedings under the state law.

2. At the time suit was filed, Ms. Popkin was a resident of Louisiana. The complaint alleged an amount in controversy in excess of $10,000.00

The Corporation moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that it was a public body and that, at the time the alleged discriminatory act took place, it was not covered by Title VII. Plaintiff contended that, under state law, the corporation had the status of a private corporation and was thus covered by Title VII at the time she was terminated. In the alternative, she argued that the 1972 Amendments to the Act should be applied to charges pending at the time of their enactment. The district court dismissed the action holding that, at the time of plaintiff's discharge, the corporation was a "political subdivision" exempt from Title VII and that the 1972 Amendments could not be applied to an event occurring before their effective date despite the fact that an EEOC charge was then pending. 409 F. Supp. 430, 432 (Appendix B, infra, p. A-8.) The Second Circuit affirmed on both grounds. (Appendix A, infra, p. A-1.

REASONS FOR GRANTING THE WRIT

In Holding That The 1972 Amendments To Title VII of the Civil Rights Act Could Not Be Applied Retroactively To Charges Pending Before the EEOC At The Time The Amendments Became Effective The Decision Below Conflicts With Decisions of This Court and Other Circuits.

Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e *et seq.* was amended as of March 24, 1972 to include within its coverage "governments, government agencies [and] political subdivisions". Publ. L. No. 92-261 §§2(1), 3. In this case the Second Circuit held these Amendments could not be applied where a discriminatory action by a state agency occurred prior to March 24, 1972, even though an administrative

charge was pending before the EEOC on that date. This holding is inconsistent with this Court's decisions in *Brown v. General Services Administration*, 42 5 U.S. , 96 S. Ct. 1961 (1976) and *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974) and decisions of other circuits.

The 1972 Amendments to Title VII not only made the Act applicable to state and local governments, but all created a right of action for federal employees. Section 717(c), 42 U.S.C. 2000e-16(c), added by the 1972 Amendments, provides that an aggrieved federal employee may commence an action under Title VII within thirty days of a final order by his agency disposing of his claim or a final order of the Civil Service Commission. Four Circuits have now held proceedings were pending and unresolved on its effective date (March 24, 1972). See, *Kroger v. Ball*, 497 F.2d 702, 706-708 (4th Cir. 1974); *Womack v. Lynn*, 504 F.2d 267, 269 (D.C.Cir. 1974); *Brown v. General Services Administration*, 507 F.2d 1300, 1305-1306 (2d Cir. 1974) aff'd, U.S. , 96 S.Ct. 1961 (1976); *Hackley v. Roudebush*, 520 F.2d 108, 122 n.4 (D.C.Cir. 1975); *Grubbs v. Butz*, 514 F. 2d 1323, 1327 (D.C.Cir. 1975); *Weahkee v. Powell*, 532 F. 2d 727, 729 (10th Cir. 1976). These decisions were all based on the rationale that discrimination in federal employment was barred by Executive Order before 1972 Amendments to Title VII and that the Amendments only provided a new method of enforcing an existing right. In *Kroger v. Ball, supra.* the Fourth Circuit noted:

> Procedural statutes that affect remedies are generally applicable to cases pending at the time of enactment. Of course, retrospective applica-

tion is not allowed when it will work a manifest injustice by destroying a vested right. But this exception plays no role here because the government has no vested right to discriminate against its employees on the basis of race.

(Footnote omitted)

497 F.2d at 706

. . . . . .

. . . .Kroger's right to be free from racial discrimination does not depend on the 1972 Act. Executive Order 11478 previously imposed a duty on the officials of his department to promote employees without regard to their race. The Act provided Kroger a supplemental remedy for a violation of the existing duty defined by the Order.

497 F. 2d at 707.

In *Brown v. General Services Administration, supra*, the Second Circuit held Section 717 available to any employee whose administrative complaint was pending when the 1972 Amendments were enacted. Affirming, this Court noted that, "the parties have apparently acquiesced in this holding by the Court of Appeals, and we have no occasion to disturb it". 96 S. Ct. at 1964, n. 4. Subsequently, the Court vacated the only Circuit Court opinion holding Section 717 not to be retroactive and remanded for further consideration in light of *Brown v. General Services Administration. Place v. Weinberger*, 497 F.2d 412 (6th Cir. 1974), *cert. granted, judgment vacated and remanded*, U.S. , 96 S. Ct. 2643 (1976). The vacatur and remand in *Place* demonstrates the significance of footnote four in *Brown* and also points the way to appropriate disposition of this petition: to grant the petition, vacate the holding of the Second Circuit, and remand for reconsideration.

Certiorari should be granted because the rationale of *Brown*, *Kroger* and the other Circuit decisions apply equally here. As in those cases, petitioner's administrative charge was pending at the time the 1972 Amendments became effective. Prior to the Amendments, neither federal nor state employees could proceed under Title VII, but both kinds of employees had a right not to be discriminated against because of race or sex. In the case of Federal employees that right was protected by executive orders and by the Fifth Amendment. In the case of state employees, the equal protection clause of the Fourteenth Amendment protected against invidious discrimination of any type.

The Second Circuit was of the view that this case was distinguishable from *Brown v. General Services Administration*, on the theory that the 1972 Amendments created entirely new substantive rights for employees of state and local governments, but not for federal employees. The Court of Appeals reasoned that since, before the 1972 Amendments, Title VII contained a proviso declaring it to be the policy of the United States to insure equal employment opportunity for federal employees, and because such discrimination was prohibited by Executive Orders 11246, 11478 and 5 U.S.C. § 1751 (1970), Section 717 was "merely a procedural section, affording no new substantive rights" Appendix A at page A- 1. By contrast, the Court held that, "entirely new substantive rights have been created for [state] employees". *Id.*

But in fact, before the 1972 Amendment, state and federal employees were in exactly the same position. In *Brown* this Court held flatly:

> Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect federal employees. 42 U.S.C. §2000e(b). Although federal employment discrimination clearly violated both the Constitution, *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L.Ed 884 (1954), and statutory law, 5 U.S.C. §7151, before passage of the 1972 Act, the effective availability of either administrative or judicial was far from sure.
>
> 96 S. Ct. at 1964.

By the exact same token, female state employees, unprotected by Title VII prior to the 1972 Amendments, had the right under state law[3] and the Fourteenth Amendment to be free of invidious discrimination because of their sex. *Reed v. Reed*, 404 U.S. 71 (1971).

The distinction made by the Second Circuit between the statuses of federal and state employees prior to the 1972 Amendments was plainly improper. The effect of the decision is to entitle federal employees to more protection

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3. The New York Human Rights Law, Consol. Laws of N.Y. §296 (a) (1968) provides in part that:

> It shall be an unlawful discriminatory practice:
> (a) For an employer . . . because of age, race, creed, color national origin, sex, or disability or marital status of any individual, to. . . discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

under the statute than state employees, even though the statute makes no distinction between them with respect to substantive rights and even though they were essentially in the same position prior to the passage of the Amendments. The decision below is as much in conflict with *Brown v. General Administration, supra*, and the cited Circuit Court decisions, as was the Third Circuit's decision in *Place v. Weinberger, supra*. It should be vacated and remanded.

A second, and equally compelling reason, for granting the writ is that the Second Circuit's rationale is completely contrary to this Court's decision in *Bradley v. School Board of the City of Richmond, supra*. *Bradley* involved the question of whether Section 718 of the Emergency School Aid Act, 20 U.S.C. §1617, authorizing an award of attorneys' fees in school desegregation cases, should be applied to lawyers' services rendered prior to the effective date of the Section in a case still pending on that date. The Fourth Circuit held the section should not be so applied. This Court reversed, holding that, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary". 416 U.S. at 711.

This case is directly analagous to *Bradley*. As with the Emergency Aid Act, the legislative history of the 1972 Amendments to Title VII is silent with respect to whether they should be applied to charges pending within the EEOC at the time of enactment. See, *Brown v. General Services Administration, supra*, 507 F. 2d at 1306. In *Bradley* this Court stated:

> [E]ven where the intervening law does not explicitly recite that it is to be applied to

pending cases, it is to be given recognition and effect.

According, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature . . .

416 U.S. at 715.

Citing two of its prior decisions[4] , the Second Circuit held, however, that to give the 1972 Amendments to Title VII retroactive effect as to pending charges would violate the rights of the state defendant. "The manifest injustice of such *ex post facto* imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively". Appendix A at A-1 . The Second Circuit was mistaken. In the first place, it's "general rule of construction" is completely different from that applied by this Court in *Bradley*. In the second place, within the frame of reference used by the Court of Appeals, the Amendments did not cause an alteration of "substantive rights". The state agency Ms. Popkin worked for did not have a vested right to discriminate against its employees because of sex. Both the Fourteenth Amendment and state statute prohibited invidious discrimination of the type she alleged. In *Bradley*, the Court defined "manifest injustice"

4. *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975) and *Monell v. Department of Social Services*, 532 F.2d 259 (2d Cir. 1976), *cert. granted on other grounds*, U.S. , 45 U.S.L.W. 3499 (Jan. 25, 1977) (No. 75-1914), held the 1972 Amendments not retroactively applicable to charges against educational institutions and city agencies pending on March 24, 1972. These are the only circuit court decisions to directly address this issue.

as the imposition of, "new and unanticipated obligations. . . without notice or an opportunity to be heard." 416 U.S. at 720. That, of course, was not the case here.

Administrative proceedings arising from Ms. Popkin's EEOC charge were pending when the 1972 Amendments to Title VII went into effect. Those proceedings were a jurisdictional prerequisite to her suit under the Act. Under these circumstances, may a statute furthering basic civil rights be denied application? This Court has recognized the importance of such questions in its decisions in *Bradley*, *Brown v. General Services Administration, supra*, and, most recently, in *International Union of Electrical Workers v. Robbins & Myers, Inc.*, U.S. , 97 S.Ct. 441 (1976), where the Court held that the increase of time for filing EEOC charges from 90 to 180 days contained in the 1972 Amendments was applicable to charges filed prior to March 24, 1972. For similar reasons, the writ here should be granted.

CONCLUSION

This case should be controlled by the prior decisions of this Court in *Bradley v. School Board of the City of Richmond* and *Brown v. General Services Administration*. For that reason, this petition should be granted and the judgment vacated and remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to Louis J. Lefkowitz, Attorney General of New York, 2 World Trade Center, New York, New York, 10047 and Joan P. Scannell, Deputy Assistant Attorney General, 2 World Trade Center, New York, New York, 10047, this 11th day of March, 1977.

GEORGE M. STRICKLER, JR.

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 80 - September Term, 1976.
(Argued October 20, 1976 - Decided December 15, 1976).
Docket No. 76-7167

MILDRED POPKIN,
Plaintiff-Appellant

v.

NEW YORK STATE HEALTH AND MENTAL HYGIENE FACILITIES IMPROVEMENT CORPORATION,
Defendant-Appellee

Before:

Smith, Oakes and Timbers,
Circuit Judges

Appeal from dismissal of Title VII Civil Rights complaint for failure to state a claim on which relief could be granted in the United States District Court for the Southern District of New York, Lloyd F. MacMahon, Judge.

Affirmed.

Floyd S. Weil, New York, N.Y. (Milton Kean, New York, N.Y., of counsel), for Appellant.

Joan P. Scannell, Deputy Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, of counsel), for Appellee.

SMITH, Circuit Judge:

Mildred Popkin appeals from an order of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, dismissing her complaint, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We affirm.

Appellant was employed as an architect by the New York State Health and Mental Hygiene Facilities Improvement Corporation ("the Corporation"). In November, 1970) she was notified that her employment would be terminated as of January 15, 1971. Appellant instituted this action under Title VII alleging that the termination was an act of discrimination based on her sex. Jurisdiction was based on 42 U.S.C. §2000e *et seq.* and 28 U.S.C. §1332. The district court dismissed the complaint on the ground that the Corporation was a "political subdivision" of New York State and was therefore excluded from coverage of 42 U.S.C. § 2000e *et seq.* prior to March 24, 1972.[1] The 1972 amend-

1. Section 701(b) of Title VII, the Civil Rights Act of 1964, P.L. 88.352 as enacted provided in relevant part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation

(footnote continued on next page)

ments to Title VII, extending coverage of the Act to political subdivisions, were held by the district court not to have retroactive effect.

The Corporation was created by the Health and Mental Hygiene Facilities Improvement Act as a "corporate governmental agency constituting a public benefit corporation." N.Y. Unconsol, Laws §§4402, 4404 (McKinney 1975). Appellant contends that because under New York law her employer is classified as a public benefit corporation and not as a political subdivision, the Corporation was not excluded from Title VII coverage before 1972 under 42 U.S.C. §2000e(b). We disagree. Title VII does not provide that the terms of the federal statute are to be construed according to state law. Title 42 U.S.C. §2000e-7 merely provides that state laws prohibiting employment discrimination will remain in effect. In the absence of a plain indication to the contrary by Congress, the application of a federal act is not dependent on state law. *Jerome v. United States*, 318 U.S. 101, 104 (1943). Congressional intent concerning

(footnote 1 - continued from previous page)

> wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof. . . .

In 1972 § 701(b), 42 U.S.C. § 2000e(b) was amended as follows:

> (b) The term "employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5). . . .

coverage of Title VII and the actual nature of appellee's relationship to the state determine whether or not the Corporation was covered by Title VII before 1972.

The Equal Employment Opportunity Act of 1972 was designed to broaden jurisdictional coverage of Title VII by deleting the existing exemptions of state and local government employees and of certain employees of educational institutions. The bill amended the Civil Rights Act of 1964 to include state and local governments, governmental agencies, and political subdivisions within the definition of "employer" in 42 U.S.C. §2000e(b). H.R. Rep. No. 92-238, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2152. The conference report of the Senate Amendment to H.R. 1746, which was adopted by the Conference, stated explicitly that the Senate Amendment "expanded coverage to include: (1) State and local governments, governmental agencies, political subdivisions. . ." *Id.* at 2180. The 1964 House Report on the Civil Rights Act of 1964, on the other hand, refers to the exclusion from the term "employer" of "all Federal, State, and local government agencies. . . ." 1964 U.S. Code Cong. & Ad. News 2402. Until 1972, state agencies as well as political subdivisions were exempt from Title VII. Under the terms of the Mental Hygiene Facilities Development Corporation Act, "state agencies" include public benefit corporations. [2]

The term "political subdivision" is not defined in 42 U.S.C. §2000e *et seq.* as such, but in 1970 the EEOC had

2. New York Unconsol. Laws § 4403(17) (McKinney 1975), contains the following definition:

"State agency" means any officer, department, board, commission, bureau division, public benefit corporation, agency or instrumentality of the state.

adopted criteria used to define political subdivisions under the National Labor Management Relations Act, 29 U.S.C. §152(2), which exclude political subdivisons of states from the definition of employer. The case involved a multi-state educational agency which claimed exemption from Title VII as a "political subdivision." The EEOC adopted the NLRB test as set forth in *NLRB v. Natural Gas Utility District of Hawkins*, 402 U.S. 600-605 (1970), and *NLRB v. Randolph Electric Corp.*, 343 F.2d 60 (4th Cir. 1965). The Commission held that the agency was a "political subdivision" created directly by the contracting states, existed solely for their mutual benefit, and performed a function traditionally performed and administered by the state governments 1973 Empl. Prac. Dec. (CCH) ¶6182 (No. 71-405, Nov. 5, 1970).

The district court's finding that the appellee was a political subdivision was clearly proper and in compliance with these standards. The Corporation was created directly by the state under the Mental Hygiene Facilities Development Corporation Act in 1968. N.Y. Unconsol. Laws § 4401 *et seq.* (McKinney 1975). Its directors are the Commissioner of Health, the Commissioner of Mental Hygiene and three persons appointed by the Governor with the advice and consent of the Senate. All five directors are subject to removal by the Governor (§4404). The directors must submit an annual report to the Governor and to state agencies and officials detailing the Corporation's yearly activities (§ 4415). All money and property of the Corporation is exempt from taxation (§4413), and all its financial matters are strictly prescribed by statute (§ §4409, 4410). Appellant's claim that the Corporation was not exempt from

Title VII has no support in either state or federal law.[3]

The 1972 amendments to Title VII have no retroactive effect where they create new substantive rights. In *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975), we noted that "[t]he manifest injustice of such *ex post facto* imposition of civil liability is reflected in the general rule of construction that absent clear legislative intent statutes altering substantive rights are not to be applied retroactively." 522 F.2d at 411 (citations omitted). Relying on *Weise*, we refused to give the 1972 amendments retroactive effect in *Monell v. Department of Social Services*, 552 F.2d 259 (1976), *petition for cert. filed*, 45 U.S.L.W. 3090 (July 2, 1976) (No. 75-1914). *Monell* involved a suit for back pay against the City of New York and the board of education for discrimination which occurred prior to 1972. The court held that entirely new substantive rights had been created for city employees under Title VII.[4] The court in *Monell* distinguished *Brown v. General Services Administration*. U.S. , 44 U.S.L.W. 4704 (1976), in which retroactive effect had been given to §717 of Title VII, 42 U.S.C. § 2000e-16(c), where federal employees were the plaintiffs. Section 717 was viewed as merely a procedural section, affording no new substantive rights. *Monell*, 532 F.2d at 262.[5]

Appellant had no substantive rights under Title VII before the 1972 amendments were enacted. No federal constitutional rights have been asserted. The district court's refusal to give the 1972 amendments to Title VII retroactive effect was correct. *Weise, Monell, supra.*

Affirmed.

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3. On March 29, 1973, the Equal Employment Opportunity Commission issued a determination that the Corporation was an employer within the meaning of Title VII and that reasonable cause existed to believe that appellant had been discriminated against on the basis of her sex. The EEOC evidently overlooked the fact that although the Corporation was subject to Title VII in 1973, the alleged discrimination against appellant predated the passage of the 1972 amendments to Title VII which extended coverage to employees of "political subdivisions."

4. See also *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 638 n. 8 (1973); cf. *Puntolillo v. New Hampshire Racing Comm'n*, 390 F. Supp. 231 (D.N.H. 1975) (giving retroactive effect to 1972 amendments).

5. Although, until 1972, Title VII, excluded the United States from the definition of "employer," it included a specific proviso declaring it to be the policy of the United States to insure equal employment opportunity for federal employees and directing the President to utilize his existing authority to effectuate this policy. P.L. 88-352 §701(b) (1964).

No comparable provision for state employees was included in Title VII prior to 1972. State employees could however assert constitutional rights under the fourteenth amendment against state agencies or municipalities, immune under 42 U.S.C. §1983, by invoking federal jurisdiction under 29 U.S.C. §1331 or §1332. *City of Kenosha v. Bruno*, 412 U.S. 507, 514 (1973); *Reeves v. City of Jackson*, 532 F.2d 491, 495 (5th Cir. 1976); *Amen v. City of Dearborn*, 532 F.2d 554, 559 (6th Cir. 1976); Wright & Miller, *Federal Practice and Procedure*, §3573 at 500. No fourteenth amendment claim has been raised by appellant here.

APPENDIX B

OPINION OF UNITED STATES DISTRICT COURT, S. D. NEW YORK

Mildred POPKIN, Plaintiff
v.
NEW YORK STATE HEALTH AND MENTAL HYGIENE FACILITIES IMPROVEMENT CORPORATION, Defendant.

No. 75 Civ. 4698 - LFM.

United States District Court, S.D. New York.

March 4, 1976

OPINION

MacMAHON, District Judge.

Defendant moves, pursuant to Rule 12(b)(6), Fed. R. Civ. P., for an order dismissing the complaint for failure to state a claim for relief.

The complaint alleges that plaintiff, a woman, was hired as an architect by defendant during January 1968 and that during November 1970 she was informed that her employment would be discontinued no later than January 15, 1971. Plaintiff contends that she was fired because of her sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Defendant asserts on this motion that it is a "political

subdivision" of the State of New York and, as such, was specifically exempted from the operation of Title VII at the time the alleged discrimination occurred. Plaintiff, conceding that "political subdivisions" were exempt at that time, argues that defendant is not a "political subdivison," or, if it is, that the 1972 amendments to Title VII eliminating this exemption should be applied retroactively.

[1,2] There is no precise formula which delineates exactly what makes a particular entity a "political subdivision." Nor does the mere characterization of an entity as a "political subdivision" make it one. Rather, the court must look into the functional relationship between the entity and the state in order to make this determination. See EEOC Decision No. 71-405, CCH Employment Practices 1973 ¶ 6182 (November 5, 1970); *NLRB v. Natural Gas Utility District of Hawkins County, Tenn.*, 402 U.S. 600, 91 S. Ct. 1746, 29 L.Ed. 2d 206 (1971).

Defendant was created by Section 4404 of the Unconsolidated Laws of New York (McKinney Supp. 1975), after the legislature had made extensive findings, including:

"that the provision of new and improved state facilities relating to the care, maintenance and treatment of the mentally disabled must be accelerated if the state is to meet its responsibilities in the face of an increasing state population, a growing awareness that mental disability can be treated effectively, and new research advances in treatment methods.

To assure that the required facilities are completed and ready for use as promptly as possible, the legislature hereby

finds and declares that there should be created a corporate governmental agency. . . which could receive and administer monies for the construction and improvement of mental hygiene facilities and provide such facilities in accordance with the foreseeable needs for the care, maintenance and treatment of the mentally disabled."
(§4402)

Another section of New York's Unconsolidated Laws, Section 4406, states that the general purpose of the defendant corporation is to provide improved mental health facilities. Defendant is governed by a board of directors, comprised of the commissioners of health and mental hygiene, and three others who are appointed, and may be removed, by the governor (§ 4404). The directors must submit an annual report to the governor and to several state agencies and officials, detailing the corporation's yearly activities (§4415).

Defendant has been given broad powers, including the powers to sue and be sued, to acquire real and personal property, to make contracts, and "to do any and all things necessary or convenient to carry out its corporate purposes and exercise the powers given and granted it in this act" (§ 4405). All money and property of the defendant is exempt from taxation (§ 4414), and all its financial matters are strictly prescribed by statute (§§4409, 4410).

[3] We find from all of the foregoing that defendant is a "political subdivision" within the meaning of Title VII. We note in particular its direct creation by the state, its governmental function, and its accountability to the governor and other state officials.

[4] Plaintiff's contention that the 1972 amendments to Title VII, eliminating the "political subdivision" exemption, should be applied retroactively is incorrect. In *Weise v. Syracuse Univerity*, 522 F.2d 397, 410-411 (2d Cir. 1975), it was held specifically that these amendments should not be given retroactive effect where the defendant had been absolutely exempt from coverage, as is the present case. The court emphasized that the retroactive application would result in manifest injustice because in this situation the amendments created new substantive rights.

Accordingly, defendant's motion, pursuant to Rule 12 (b)(6), Fed. R. Civ. P., for an order dismissing the complaint for failure to state a claim for relief is granted.

So ordered.